

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and  
STATE OF CALIFORNIA,

Case No. 91-0768-JAM-JFM

ORDER GRANTING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGEMENT

Plaintiffs,

v.

IRON MOUNTAIN MINES and T.W.  
ARMAN,

Defendants.

\_\_\_\_\_/

This matter comes before the Court on a motion for partial summary judgment (Doc. #1280) by Plaintiff the United States of America ("Plaintiff"), pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. § 9607(a), and Federal Rule of Civil Procedure 56. Defendants Iron Mountain Mines and T.W.

Arman ("Defendants") oppose the motion.<sup>1</sup> (Doc. #1310). For the reasons set forth below, Plaintiff's motion is GRANTED.

#### FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1986, the Environmental Protection Agency ("EPA") responded to the release of hazardous waste at what is now called the Iron Mountain Mines Superfund Site ("the site"). The EPA took action to reduce or eliminate acid mine drainage discharges from the site, and incurred costs in doing so ("response costs").

The site has been the subject of litigation in this Court since 1991. In this motion, Plaintiff seeks only response costs incurred through February 29, 1996. Costs incurred after this date to the present, as well as future costs, were part of a previous settlement ("the settlement" or "consent decree") with former defendant Rhône-Poulenc and other settling parties. Defendants were not parties to that settlement, nonetheless Plaintiff does not seek recovery from Defendants for those post-February 29, 1996, costs covered by the settlement.

In 2002, this Court found Defendants to be a "partially responsible party" for the site contamination, and found them jointly and severally liable for response costs under CERCLA

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

(Doc. #1241). Plaintiff settled with other defendants in the case, but Plaintiff and Defendants Iron Mountain Mines and T.W. Arman engaged in years of ultimately unsuccessful settlement negotiations. In August 2009, Plaintiff brought the present motion for partial summary judgment. In December 2009, Defendants sought reconsideration of the Court's 2002 order, on the issue of apportionment of liability. The motion for reconsideration was denied. (Doc. #1316). Thus, the Court's 2002 order stands, and Defendants remain jointly and severally liable for the entire harm at the site.

Plaintiff seeks a total award of \$57,139,669.53 in costs. This includes response costs through February 29, 1996 (\$26,968,134.84), plus prejudgment interest through Fiscal Year 2009 (\$30,172,534.69).

## I. OPINION

### A. Legal Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Because the purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses," Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986), "[i]f summary judgment is not rendered on the whole

1 action, the court should, to the extent practicable, determine  
2 what material facts are not genuinely at issue." Fed. R. Civ. P.  
3 56(d).

4  
5 The moving party bears the initial burden of demonstrating  
6 the absence of a genuine issue of material fact for trial.

7 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

8 If the moving party meets its burden, the burden of production  
9 then shifts so that "the non-moving party must set forth, by  
10 affidavit or as otherwise provided in Rule 56, 'specific facts  
11 showing that there is a genuine issue for trial.'" T.W. Elec.

12 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626,  
13 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e)). The Court  
14 must view the facts and draw inferences in the manner most  
15 favorable to the non-moving party. United States v. Diebold,  
16 Inc., 369 U.S. 654, 655 (1962).

17  
18 A "scintilla of evidence" is insufficient to support the  
19 non-moving party's position; "there must be evidence on which  
20 the jury could reasonably find for the [non-moving party]."  
21 Anderson, 477 U.S. at 252. Accordingly, this Court applies to  
22 either a defendant's or plaintiff's motion for summary judgment  
23 essentially the same standard as for a motion for directed  
24 verdict, which is "whether the evidence presents a sufficient  
25 disagreement to require submission to a jury or whether it is so  
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one-sided that one party must prevail as a matter of law." Id.  
at 251-52.

B. CERCLA

Pursuant to CERCLA Section 107(a), an owner and operator of any facility at which hazardous substances were disposed shall be liable for all costs of removal or remedial actions incurred by the United States government, not inconsistent with the National Contingency Plan. 42 U.S.C. § 9607(a). CERCLA Section 107(a) is a strict liability statute. Burlington Northern v. United States, 129 S. Ct. 1870, 1878 (2009).

The purpose of the National Contingency Plan ("NCP") is "to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." 40 C.F.R. § 300.1. The NCP is required by Section 105 of CERCLA and section 311(d) of the Clean Water Act ("CWA"), and is applicable to response actions taken pursuant to CERCLA and the CWA. 40 C.F.R. § 300.2.

In a CERCLA cost recovery action, the government must first establish a prima facie case for recovery. "To establish a prima facie case to recover its response costs under CERCLA § 107, the government has to prove: (1) the site is a "facility"; (2) a "release" or "threatened release" of a hazardous substance

1 occurred; (3) the government incurred costs in responding to the  
2 release or threatened release; and (4) the defendant is the  
3 liable party. Once the government presents a prima facie case  
4 for response costs, the burden shifts to the defendant to prove  
5 the government's response action was inconsistent with the  
6 National Contingency Plan." United States v. Chapman, 146 F.3d  
7 1166, 1169 (9th Cir. 1998).

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9 Plaintiff has met its burden to establish a prima facie  
10 case for recovery under CERCLA. Prior orders of this Court  
11 established that Defendants are liable parties (See Doc. #1241),  
12 that the site is a CERCLA "facility," (See Doc. #1241) and that  
13 the site released hazardous substances (See Doc. #1241, and U.S.  
14 v. Iron Mountain Mines, Inc., 812 F.Supp. 1528, 1541-42 (E.D.  
15 Cal. 1992)). In the current motion, Plaintiff has set forth in  
16 detail evidence of the costs incurred through February 29, 1996,  
17 by the government in responding to Defendants' release of  
18 hazardous substances.

19  
20 Accordingly, the burden shifts to Defendants to prove that  
21 the government's response action was inconsistent with the NCP.  
22 Defendants must show that the government's selections of the  
23 remedies, for which it incurred the costs, were inconsistent  
24 with the NCP. United States v. W.R. Grace & Co., 429 F.3d 1224,  
25 1232 n. 13 (9th Cir. 2005). To show inconsistency with the NCP,  
26 Defendant must demonstrate that the EPA's response action was  
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1 arbitrary and capricious. United States v. Chapman, 146 F.3d  
2 1116, 1171 (9th Cir. 1998). The Supreme Court has said that in  
3 determining whether an agency decision was arbitrary or  
4 capricious, the reviewing court "must consider whether the  
5 decision was based on a consideration of the relevant factors  
6 and whether there has been a clear error of judgment. This  
7 inquiry must be searching and careful, but the ultimate standard  
8 of review is a narrow one. When specialists express conflicting  
9 views, an agency must have discretion to rely on the reasonable  
10 opinions of its own qualified experts even if, as an original  
11 matter, a court might find contrary views more persuasive."  
12 Marsh v. Oregon Natural Resources Council, 490 US 360, 377-78  
13 (1989) (internal citations omitted).

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17 Defendants have not met their burden. There is no evidence  
18 presented by Defendants which demonstrates that the government's  
19 response was inconsistent with the NCP. Defendants also have not  
20 offered evidence that the EPA acted in an arbitrary or  
21 capricious manner or that there were, "specialists with  
22 conflicting views." The most Defendants offer is a statement in  
23 their opposition brief that they believe they could present  
24 arguments that the selected remedial actions were not consistent  
25 with the NCP, if given more time. Defendants do not elaborate on  
26 how they would do this or what evidence leads them to even  
27 speculate that the response actions were inconsistent with the  
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1 NCP. Defendants only submit an affidavit from their counsel  
2 stating that they have located and spoken with Mr. Michael  
3 Bickers, who was involved in the preparation of a mining  
4 proposal as an alternative to EPA remedies. However, Defendants  
5 do not offer an affidavit from Mr. Bickers, nor information on  
6 the evidence he might present or what testimony he might offer.  
7

8 Defendants ask for more time to conduct discovery, but as  
9 Plaintiff argues, Defendant fails to submit affidavits or set  
10 forth the particular facts expected from further discovery.  
11 Federal Rule of Civil Procedure 56(e)(2) requires defendants to  
12 show that they have set forth in an affidavit or other form the  
13 specific facts that they hope to elicit from further discovery,  
14 that the facts sought exist, and that these sought-after facts  
15 are essential to resist the summary judgment motion.  
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18 Defendants admit they have not reviewed the administrative  
19 record for evidence of inconsistency with the NCP, but contend  
20 that the Court need not reach this issue. Defendants contend  
21 that the settlement reached between Plaintiff, Rhône-Poulenc,  
22 and the other settling parties precludes further recovery of  
23 costs. As discussed below, Defendants' contention is without  
24 merit.  
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1 E. Settlement Credit

2 Rhône-Poulenc, later known as Aventis CropScience USA Inc.,  
3 was a former defendant in this case. Rhône-Poulenc undertook  
4 cleanup activities at the site pursuant to EPA administrative  
5 orders. Rhône-Poulenc and other defendants later settled with  
6 Plaintiff in a consent decree (Doc. #1185), for approximately  
7 \$154 million to insure future cleanup costs over 30 years, \$10  
8 million for natural resource damage and an additional \$7 million  
9 for future cleanup not covered by the insurance. Thus, Rhône-  
10 Poulenc and the other settling defendants are no longer  
11 defendants in this case. However, the terms of the settlement  
12 are disputed by the parties to the current motion.  
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15 Plaintiff contends that the settlement was only for future  
16 costs, not for past costs. Thus, the settlement did not include  
17 the pre-February 29, 1996, response costs now sought, and does  
18 not constitute complete recovery. Defendants argue that  
19 Plaintiff has already been compensated for cleanup via the  
20 settlement, thus amounting to a complete credit for Defendants  
21 against costs now sought.  
22

23  
24 When a settlement is reached in a CERCLA action, section  
25 113(f)(2) reduces the liability of non-settling responsible  
26 parties, by the amount of the settlement. Section 113(f)(2)  
27 states that "A person who has resolved its liability to the  
28 United States or a State in an administrative or judicially

1 approved settlement shall not be liable for claims for  
2 contribution regarding matters addressed in the settlement. Such  
3 settlement does not discharge any of the other potentially  
4 responsible persons unless its terms so provide, but it reduces  
5 the potential liability of others by the amount of the  
6 settlement." 42 U.S.C. §9613(f)(2). Furthermore, Section  
7 113(f)(3)(a) provides that if the United States has obtained  
8 less than complete relief from a person who has resolved its  
9 liability to the United States, the United States may bring an  
10 action against any person who has not so resolved its liability.  
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12  
13 Defendants argue that the settlement reduces their  
14 liability, thus they are entitled to a credit in the amount of  
15 the insurance policy paid for by Rhône-Poulenc. In this case, a  
16 credit in that amount would not merely offset Defendants'  
17 liability, it would eliminate their liability entirely, as the  
18 full amount of the insurance policy dwarfs the \$26 million in  
19 pre- February 29, 1996, response costs that Plaintiff seeks. In  
20 Defendants' view, the settlement constitutes complete recovery  
21 for Plaintiff, and even if it does not, this will not be  
22 definitively known until after the thirty year period of payment  
23 for the cleanup insurance. Plaintiff argues that Defendants are  
24 not entitled to a credit for past response costs, the EPA has  
25 received no money from the settlement for past costs, and the  
26 law does not require Plaintiff to wait until the end of the 30  
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1 year insurance period to seek compensation from Defendants for  
2 past response costs. Plaintiff correctly points out that while  
3 the settlement provides the settling defendants with protection  
4 from claims for contribution for past costs, this does not mean  
5 that the settling defendants paid any money towards past costs.  
6 Having reviewed the terms of the consent decree, the Court  
7 agrees with Plaintiff that the money paid for the insurance  
8 policy was specifically designated for future cleanup and  
9 maintenance costs. While the terms of the settlement release the  
10 settling parties from any claims for contribution for past or  
11 future response costs, there is no evidence that the money paid  
12 out for the settlement was for pre-February 29, 1996, response  
13 costs.  
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15  
16 Plaintiff acknowledges that Defendants are entitled to a  
17 credit for future costs being paid for from the insurance  
18 policy, as the government has been compensated for these future  
19 costs via the settlement. However, this does not entitle  
20 Defendants to a credit for past response costs, nor does the  
21 settlement release Defendants from liability for past costs, as  
22 they were not among the settling parties. Furthermore, Plaintiff  
23 notes that the government is not seeking money for past natural  
24 resource damage, thus to the extent that past natural resource  
25 damage costs were covered by the settlement, this does not  
26 reduce Defendants' liability for past response costs.  
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1 CERCLA Section 113(f)(3) permits suit against non-  
2 settling responsible parties only if the relief obtained by the  
3 United States was less than complete. United States v.  
4 Occidental Chem. Corp., 200 F.3d 143, 148 (3rd Cir. 1999). The  
5 Court in Occidental found that until the government had  
6 completed its cleanup and been paid, it was entitled to sue  
7 remaining responsible parties. Id. at 149-50. When deciding  
8 suits for CERCLA recovery, courts have looked to the amount of  
9 money in the government's actual possession and control, to  
10 determine the amount of a credit, if any, non-settling parties  
11 should receive. The Court in Goodrich v. Betkoski, 99 F.3d 505,  
12 529 (2d Cir. 1996), overruled on other grounds in New York v.  
13 Natl. Services Indus., 352 F.3d 682, 684 (2d Cir. 2003), found  
14 that non-settling parties were not entitled to a Section  
15 113(f)(2) credit for a payment made as part of a consent decree,  
16 because "The government had neither possession nor actual  
17 control over the \$1.975 million given to the Laurel Park  
18 Coalition." Likewise, the Court in O'Neil v. Piccillo, 682  
19 F.Supp. 706, 729-30 (D.R.I. 1988) found that non-settling  
20 defendant were entitled to a credit for cash received by the  
21 State, but not for the value of promised future remedial work.

22 CERCLA Section 122 authorizes the President to enter in to  
23 settlements, "whenever practicable and in the public interest  
24 and consistent with the NCP," to expedite remedial actions and  
25

1 minimize litigation. 42 U.S.C. § 9622(a). The Court agrees with  
2 Plaintiff that a finding that a settlement which insured payment  
3 for future cleanup precluded recovery of past cleanup costs  
4 would be inconsistent with CERCLA's intent to encourage  
5 settlements, as it would discourage the government from entering  
6 into settlements. Plaintiff has set forth clearly and in great  
7 detail the past response costs sought by the government, and has  
8 demonstrated that payment to the EPA for such costs was not  
9 included in the settlement with Rhône-Poulenc and the other  
10 settling parties.  
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13 Accordingly, the Court finds that Defendants are not  
14 entitled to a credit for past costs, as the settlement does not  
15 constitute complete recovery. The settlement did not provide for  
16 pre-February 29, 1996, response costs, the EPA received no money  
17 for such costs from the settlement, and Defendants, as non-  
18 settling partially responsible parties, may be held liable for  
19 these costs.  
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23 F. Administrative record

24 CERCLA Section 113(j)(1) limits judicial review of any  
25 issues concerning the adequacy of the response action taken, to  
26 the administrative record. The Court applies the arbitrary and  
27 capricious standard to this review. 42 U.S.C. § 9613(j)(1).  
28 Defendants allege that they did not have sufficient time to

1 review and challenge the extensive administrative record, and  
2 ask the Court for more time. The Court has already granted an  
3 extension of time, postponing Defendants' deadline for  
4 responding to the summary judgment motion for 5 months.  
5  
6 Throughout the course of settlement negotiations, Defendants  
7 have had years to review the administrative record, had they  
8 chosen to do so. Thus the Court will not allow further time for  
9 Defendants to attempt to find or create issues of material fact.  
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11 As Plaintiff notes, there is no indication from Defendants that  
12 even if given more time, they would be able to come up with a  
13 valid dispute.

14         With respect to evidentiary issues, Defendants have raised  
15 a variety of evidentiary objections challenging the  
16 admissibility of Plaintiff's evidence.<sup>2</sup> Defendants have also  
17 tentatively disputed some of the facts put forth by Plaintiff in  
18 Plaintiff's statement of undisputed facts, asking for more time  
19 to respond. As explained above, the Court will not grant more  
20 Defendants more time for discovery or further delay resolution  
21 of this matter. Defendants have not met their burden of  
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26 <sup>2</sup> Objections filed by Defendants (Doc. # 1310) are overruled for  
27 purposes of these motions. The 117 pages of 125 objections are  
28 unnecessary to the determination of this motion. See Judge  
William Shubb's excellent discussion of evidentiary objections  
in Burch v. Regents of the University of California, 433  
F.Supp.2d 1110, 1118-1122 (E.D. Cal. 2006).

1 demonstrating inconsistency with the NCP, nor have they shown  
2 that the administrative record reveals arbitrary or capricious  
3 decision making by the EPA.  
4

5 Plaintiff has demonstrated a prima facie case for recovery  
6 of response costs, and Defendants have not shown the response to  
7 be inconsistent with the NCP. Accordingly, Plaintiff's motion  
8 for partial summary judgment is granted. Defendants' are not  
9 entitled to a credit for any portion of the settlement to cover  
10 the past response costs sought by Plaintiff.  
11

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13 III. ORDER

14 For the reasons set forth above, the United States motion  
15 for partial summary judgment for response costs is GRANTED.  
16

17 It is ordered that the defendants T.W. Arman and Iron  
18 Mountain Mines, Inc. are jointly and severally liable to the  
19 United States, under Section 107(a) of CERCLA, 42 U.S.C. §  
20 9607(a), for response costs in the amount of \$26,968,134.84  
21 incurred by federal agencies through February 29, 1996,  
22 responding to releases and threatened releases of hazardous  
23 substances at the Iron Mountain Superfund Site.  
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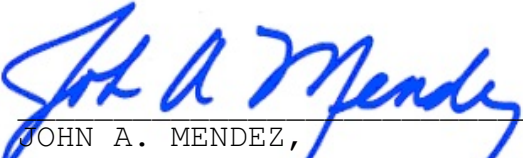
25 It is further ordered that defendants T.W. Arman and Iron  
26 Mountain Mines, Inc. are jointly and severally liable to the  
27 United States, under Section 107(a) of CERCLA, 42 U.S.C. §  
28 9607(a), for prejudgment interest accruing on the response costs

1 incurred by federal agencies, interest through Fiscal Year 2009  
2 having been calculated to be \$30,172,534.69.

3 It is further ordered that Defendants T.W. Arman and Iron  
4 Mountain Mines, Inc. are jointly and severally liable for  
5 additional prejudgment interest which accrues after September  
6 30, 2009, and until this judgment is paid in full.

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9 IT IS SO ORDERED.

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12 Dated: July 13, 2010

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15 JOHN A. MENDEZ,  
16 UNITED STATES DISTRICT JUDGE  
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